

Appeal No: 16-56647
USDC 5:16-cv-00952-JGB-SP

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In
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Yoana A. Kiprilov,
Appellant-Plaintiff,

-v.-

National Board of Medical Examiners,
Appellee-Defendant

MOTION FOR SUMMARY REVERSAL AND INJUNCTIVE RELIEF

RESPECTFULLY SUBMITTED BY THE APPELLANT

Attachments

Appeal from the United States District Court,
Central District of California
District Court No: 5:16-cv-00952-JGB-SPx
(Hon. Jesus G. Bernal, Hon. Sherry Pym)

Appellant in Pro se

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Dismissal of FAC (First Am. Complaint)

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Accordingly, the Court GRANTS Defendant NMBE's Motion to Dismiss as to Plaintiff's FAL claims.

F. Breach of contract

Plaintiff appears to allege that she had an implied contract with NMBE, although she does not explain the nature of this contract. FAC at 27. Reading between the lines, it appears that Plaintiff claims that NMBE breached a contract with her by violating its own "retakes" policy and failing to give her a passing score. *Id.* at 3 ("I have passed each part/component of the exam and NBME violated their own policy rules (published on their website) that once a component is passed, it is not allowed to be retaken.")

A claim for breach of contract under California law consists of: (1) the existence of a contract; (2) performance by the plaintiff; (3) breach by defendant; and (4) damage resulting from the breach. *Gerritsen v. Warner Bros. Entm't Inc.*, 116 F. Supp. 3d 1104, 1124 (C.D. Cal. 2015). While a contract may be implied, a plaintiff must still allege the facts from which the contract is implied. *NovelPoster v. Javitch Canfield Grp.*, No. 13-CV-05186-WHO, 2014 WL 10556991, at *9 (N.D. Cal. Aug. 14, 2014).

Plaintiff has not established facts that would support the existence of a contract between the parties—and certainly not one that contractually bound NMBE to give her a passing score despite her failure to pass every subcomponent of the Step CS 2 in one sitting. Plaintiff's desire to change the policies that *actually* govern the scoring of USMLE does not convert NMBE's refusal to pass her into a breach of a contract. Furthermore, she has not even established that NMBE "violated their own policy rules"; again, her own unreasonable interpretation or confusion surrounding USMLE policies does not change what the policies actually are. → cured in SAC (see pages 2-11)

Accordingly, the Court GRANTS Defendant NMBE's Motion to Dismiss as to Plaintiff's breach of contract claims.

G. Deceptive Acts and Practices (Federal Trade Commission Act)

Plaintiff alleges claims under a provision of the Federal Trade Commission Act ("FTCA") that makes it unlawful to engage in "deceptive acts or practices in or affecting commerce." 15 U.S.C. §§ 45(a)(1). However, as NBME points out, the FTCA does not create a private right of action. *O'Donnell v. Bank of Am., Nat. Ass'n*, 504 F. App'x 566, 568 (9th Cir. 2013). Plaintiff concedes this point in her Opposition. Opp'n at 20. Accordingly, the Court GRANTS Defendant NBME's Motion to Dismiss as to Plaintiff's claims under the FTC.⁶

⁶ The FAC also references "California state laws" under this cause of action as well. FAC at 29. However, she only cites to "Civil code Sections 17200, 17205, and 17206," none of which exist. *Id.* To the extent that Plaintiff may be attempting to reference sections of the California Business and Professions Code (e.g., Cal. Bus. & Prof. Code § 17200), the Court has already addressed these claims earlier in this Order.

SAC
existence of Contract'

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1 **Defendant's refusal to consider it and perform accordingly, also violated her right**
 2 **to a fair and ethical evaluation/assessment.** As it can be seen further down, Courts
 3 always determine whether the purpose of the contract is fulfilled regardless of whether
 4 all the criteria have been met, since we all know that some of these criteria are made to
 5 benefit the Defendant (even though in some situations they are unreasonable).

6
 7 **ELEMENT 1.**

8 Defendant and Plaintiff entered a written bilateral contract specifically for Step 2 CS in
 9 March 2015. The terms and conditions are published online and also on my exam
 10 reports (the "single administration" requirement is missing from my result reports).
 11 Consideration seemed relatively adequate, (although the exam is considered as
 12 extremely expensive and its effectiveness is questionable). NBME offers a passing
 13 outcome if the examinee demonstrates the necessary skills and thus "readiness to
 14 enter a residency" (hence: NBME does not claim and guarantee that the public is
 15 protected by the passing the 2 CS – exam).

16 As seen from the contract, Plaintiff had to pay ECFMG for the exam and take the
 17 exam at the ECFMG-center. Plaintiff did this, which is not disputed. A pass evaluation is
 18 given if the examinee demonstrates the necessary "skills to communicate effectively
 19 with the patient".

20 **The only purpose for the medical graduates to enter this contract with**
 21 **NBME/ECFMG is to receive a pass evaluation.**

22 **NBME/ECFMG receives the same amount of money regardless of the**
 23 **examinee's score, but of course, if the examinee fails, this will bring more money**
 24 **to NBME/ECFMG, since the examinee will have to retake the exam.**

25 **The essence (purpose) of the contract can simply be described as having to**
 26 **two elements contracted for by the two parties: demonstration of skills on each**
 27 **part of 2 CS, and passing outcome. Here, the first one has been fulfilled by the**
 28 **Plaintiff, Defendant refused to fulfill the second one.**

SAC existence of contract.

1 Parties (both capable of contracting) agreed, as demonstrated by parties' subsequent
2 conduct in accordance with terms of the contract (payment, acceptance of payment,
3 each party's performance of the contract). NBME Defendant although initially argued
4 that I have not proven the existence of a contract (and tried to deny it), later admitted in
5 their pleadings that we are in a contract and even cited cases:

6 *"Courts have likewise recognized that the relationship between a testing entity and an*
7 *examinee is contractual, and that the terms of the contract include the published testing*
8 *policies for the exam. See, e.g., Sims v. Taylor, 270 Fed. App'x 940, 944-45 (11th Cir.*
9 *2008); San Mateo High Sch. Dist. v. Educational Testing Serv., 2013 WL4711611, *7-8*
10 *(N.D. Cal. 2013)", and*

11 ***"NBME agrees that its relationship with Dr. Kiprilov is contractual in nature, and***
12 ***that the terms of the contract are found in the policies that NBME made available***
13 ***to her on its website prior to testing."***

14 The same policy does state that my pass results on each part (even though achieved in
15 two attempts are not valid, or that my previous attempts will be invalidated and not
16 considered). The same policy also states that transcripts *"Your USMLE transcript*
17 *includes the following: your complete examination history of all Steps and Step*
18 *Components that you took"*.

19 Thus, the fact that we are in a contractual relationship is not disputed by NBME (and
20 by the parties). We are in agreement that we are in a written contract and NBME has
21 already provided to this COURT EXHIBITS (purporting to be copy of the online-
22 specified contract terms, step 2 CS-SECTION on usmle.org-website). I respectfully
23 request the Court to consider all the EXHIBITs and Statements made so far
24 (including for the motion for summary judgement) in order to avoid further
25 re-submission of the same documents, which would be an extreme financial
26 hardship to me (and very high printing costs.). If I still have to prove the
27 existence/elements of the contract, I respectfully request that I will do it in my
28 reply or during the hearing.

SAC existence of contract

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1 **reliability), the attempts give different results (here, even opposite). That is why,**
2 **NBME's most recent research showed that the results from the attempts show be**
3 **considered. But NBME ignored this results.**

4 Defendant and Plaintiff have a contractual relationship, with the terms regarding the
5 product and the performance by both parties described on the usmle - website, as noted
6 by NBME previously in their pleadings. As per Evid.code 622-623 they should not be
7 allowed to contradict that). **The purpose of the contract is to:**

8 "11. Step 2 CS assesses whether physicians seeking an initial license to practice
9 medicine...can communicate effectively with patients." AND

10 "12. Step 2 CS is a pass/fail examination on which examinees are scored on
11 three separate subcomponents".

12 **The purpose for which an examinee enters this contract is to receive a passing**
13 **outcome on Step 2 CS, which allows him to be employed as a physician. That is**
14 **why a full performance and passing the exam is entirely for Plaintiff's benefit and**
15 **the examinee promised to take it in good faith under NBME/ECFMG's conditions.**
16 **NBME/ECFMG charges the same amount of money, regardless of the result.**
17 **NBME's offer and promise, in accordance with the purpose the test, is to grant a**
18 **passing outcome when the examinee demonstrates these skills so that the**
19 **examinee can continue his training.**

20 Civil Code section 1549 provides: "A contract is an agreement to do or not to do a
21 certain thing." Courts have defined the term as follows: "A contract is a voluntary and
22 lawful agreement, by competent parties, for a good consideration, to do or not to do
23 a specified thing." (Robinson v. Magee (1858) 9 Cal. 81, 83.).

24 "1708. Every person is bound, without contract, to abstain from
25 injuring the person or property of another, or infringing upon any of
26 his or her rights."

27 **NBME breached the contract by a) not granting a passing outcome**
28 **corresponding to the Plaintiff's substantial performance, b) NBME intentionally**

SAC- Reliability claim.

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the any parts). NBME's explanation that "it is possible to fail a section previously passed" sound also illogical, since following the same logic, all single-take examinees should retake the exam every few months to see if they pass again or fail.

3.3. NBME also prevented me from a full performance, since they ignored the reliability problem that affected my results (although NBME admits that the exam had this problem before, but claim the problem had been resolved since 2004), NBME ignored their own research studies showing that the scores from the two attempts should be considered (which refused to do in their pleadings as well), that CIS-results are affected by rater drift (i.e. depend on the rater, not on the examinee's skills). NBME ignored the contrast and sequence effects that affect the scores. NBME tested me on part of ICE (data gathering score) that was found to be useless for the purpose of the exam (assessing skills and thus readiness for residency). NBME ignored the an important official guideline that is the "Use of selection procedures to evaluate applicants for a higher level job would not be appropriate: If the selection procedures measure knowledges, skills, or abilities required for advancement which would be expected to develop principally from the training or experience on the job", residency is a training program (EEOC-GUIDELINES, "These guidelines... are designed to assist... licensing and certification boards... to provide a framework for determining the proper use of tests and other selection procedures". NBME ignored other W. Levinson's studies (which show how NBME's criteria are wrong, the 15 min v 18-min visit, and the fact that depending on the specialty- the skills should be different). And finally, NBME prevented me from a full performance, since NBME created artificially a group that is set to have a lower passing rate, which has very likely affected my scores and should be considered as well. This is how NBME's intentional misconduct and bad faith caused damages and breached the contract.

3.4. And it is not about changing scoring policy because of me, as NBME made the Court to believe (and the Court believes). IT IS about NBME's practicing a fair

SAC- Reliability claim

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1 **A reliability of a test** and its importance was shown in one of my exhibits.
 2 ("Assessment decision guide"), where it was stated that unreliable test should not
 3 be used for predicting "job performance" (which is what NBME claims their
 4 product Step 2 CS is used for). Moreover **"predicting job performance"** would
 5 **directly affect my future employer's decision for hiring since it provides the**
 6 **wrong information to my employer (especially if it is so inaccurate).**

7 **A. "Reliability refers to how dependably or consistently a test measures a**
 8 **characteristic. If a person takes the test again, will he or she get a similar test**
 9 **score, or a much different score? A test that yields similar scores for a person**
 10 **who repeats the test is said to measure a characteristic reliably."** ("Testing and
 11 Assessment: An Employer's Guide to Good Practices (Guide) was produced and
 12 funded by the Skills Assessment and Analysis Program in the U.S. Department of
 13 Labor, Employment and Training Administration").

14 **"Different forms of a test are known as parallel forms or alternate forms.**
 15 **Because the forms are not exactly the same, a test taker might do better on**
 16 **one form than on another."** (showing how I was unfairly tested on a part that I
 17 have passed, but using a different form and different standardized patients that
 18 gave me different results). **Single-take examinee is not tested again on another**
 19 **forms by different Stand. Patients to see if he will pass again or fail.**

20 **"Differences in training, experience, and frame of reference**
 21 **among raters can produce different test scores for the test taker"** (says the same
 22 "Guide"). If the Court agrees with NBME that I should be tested again on CIS or
 23 ICE, then this would mean that everybody who has passed these parts should be
 24 tested again, using the same reasons- people might have lost these skills for 4
 25 months. **The parts according to NBME are "separate" and "different", despite**
 26 **the "single administration" requirement, which allows these parts to be**
 27 **reviewed, taken and passed separately.**
 28

FAC- Reliability claim

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1 exam - subjectivity, unreliability, contrast effects, sequence effects, and
2 unpublished yet possible discriminatory effects, and so on. Attached hereto
3 as an EXHIBIT Y" is a copy of the petition.
4

5 **15. NBME and ECFMG also claimed that the test is now reliable,**
6 **although they admit that this particular exam had problems in past and**
7 **was "dropped in 1960s because of questions at the time about its**
8 **reliability".**

9 Reliability is a one of the two most important characteristics of a test or
10 experiment (the other one being validity), which shows the quality of the
11 measurement tool, i.e. how dependably or consistently a test/assessment
12 measures a characteristic when administered twice to the same person.

13 **A reliable test would show similar results, not completely opposite**
14 **results (as in my case). These facts prove that the exam still has**
15 **reliability problems. Attached hereto "EXHIBIT Z", copy of "Assessment**
16 **decision guide" and, "Testing and assessment: an employer's guide to**
17 **good practice". As cited before, in the website proftesting.com: "If a test**
18 **yields inconsistent scores, it may be unethical to take any substantive**
19 **actions on the basis of the test."**
20

21 **16. NBME/ECFMG either have different cut off levels and passing scores**
22 **for foreign medical graduates, resulting in a difference in the passing rates**
23 **(as they admit publicly in a statement). Or, the exam itself due to its**
24 **defectiveness, gives these discriminatory results, i.e. it is a defective**
25 **product. This specific characteristic of the exam has never been**
26 **investigated. Although the discriminatory results - 18% v. 3% (difference)**
27 **decrease in the passing rate for non-US graduates v. US-graduates, is an**
28

FAC Reliability claim

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FAQs

FAQs - Frequently Asked Questions

Step 2 CS

Step 2 CS (Clinical Skills)

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General

Rationale

1. Why does the USMLE include a clinical skills component?
2. What studies support this need?
3. If assessment of clinical skills is so important, why was it absent from the USMLE until 2004?

A version of the medical licensing exam many decades ago, in fact, included a "bedside encounter" to assess clinical skills but it was dropped in the 1960s because of questions at the time about its reliability. In 2004, an assessment of clinical skills was added to the USMLE because pilot studies showed it was reliable. Advances in testing science and in computerization made this possible.
4. Why isn't my passing grade on clinical skills exams in medical school sufficient for the licensing board?

Exam Design

5. How are licensing boards involved in the USMLE and Step 2 CS?
6. How does the USMLE program decide what cases will be presented in Step 2 CS and what skills will be assessed?
7. What evidence is there that the design of Step 2 CS is sound?

Pass Rate and Impact

8. How many people pass Step 2 CS?
9. Will I be able to learn how I performed on specific areas of the exam?

Number of Testing Sites

10. Why are there so few testing sites for Step 2 CS?
11. Why doesn't the USMLE program use some of the excellent clinical skills facilities at universities to expand testing sites?

FAC-Reliability/validity claim

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FAQs - Frequently Asked Questions

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General

1. Upcoming changes to USMLE
2. Will you continue to report scores, or change to pass/fail?
3. What are the "competencies"? Are they all going to be assessed in USMLE? How?

In accordance with direction from the USMLE Composite Committee and the Committee to Evaluate the USMLE Program, USMLE governance will consider changes to the examination sequence in the context of competencies that have become increasingly prevalent in recent years as a means of organizing medical education and assessment. One of the most commonly used competency frameworks was developed collaboratively by the ACGME and the ABMS. This framework identifies six competencies: medical knowledge, patient care, communication and interpersonal skills, professionalism, practice-based learning and improvement, and systems-based practice. Some in the medical education and practice community have also identified a seventh competency related to surgical and other technical procedural skills.

The NBME will explore how best to assess examinees in all competency areas. It is likely that the assessments available via a revised USMLE will not be able to measure all competencies to an equal degree. It is possible that one or more competencies will not be measurable in a valid manner in the context of the USMLE. During implementation of changes to the USMLE, staff will identify how best to assess examinees' performance in each of the competencies using available methods, develop a research agenda to expand assessment tools for competencies not adequately measured presently, and identify competencies that cannot be reliably measured in USMLE so that assessments in other contexts (e.g., residency training programs) can supplement the information provided by the USMLE.

Posted: November 2014

4. The USMLE program says that new item formats are currently under development. Can you tell me more about this?

Step 1 and Step 2 CK

1. Will Step 1 and 2 CK be combined into one exam?
2. If the current Step structure changes, how can medical schools that make promotion decisions (from MS2 to MS3) continue to make these decisions?
3. Can you tell me more about what is meant by "an increased focus on quality improvement principles and safety science" in the Step 1 exam, and about what is meant by "an increased emphasis on quality improvement principles, safety science, epidemiology, biostatistics, and population health; professionalism and interpersonal and communications skills" in the Step 2 CK exam?

Step 3

1. Will the restructured Step 3 mean a change in the eligibility requirements for taking the exam?

SAC - Combining Attempts / Reliability claim

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1 **B. An NBME's own research study "(Measurement precision for repeat**
 2 **examinees on a standardized patient examination, 2011") stated and advised**
 3 **that:** *part of 2CS-exam*

4 1)"CIS may be more susceptible than other skills to rater drift (Harik et al. 2009),
 5 and such drift may contribute to score changes."

6 2)"Although it is common practice to base pass-fail decisions only on scores from
 7 the second attempt, it has been shown that decision consistency improves
 8 by averaging scores from the two attempts (Clauser and Nungester 2001)."
 9 We further propose the use of a weighted average, where the score for each
 10 attempt is weighted by the inverse of its conditional SEM^{*}, thereby producing a
 11 composite that gives more influence to the more reliable assessment. Future
 12 research might investigate the utility of the use of conditional SEMs for this
 13 purpose." SEM^{*} (Standard error of measurement- the difference between the
 14 actual value and the measured value).

15 NBME in its own recent research claims the scores from previous
 16 attempts should be considered and proposes a new way of (more
 17 accurate) evaluation, but on my case refuses to do so (in my email on Jan 26,
 18 2016-"the result is not compared with or influenced by a previously taken
 19 examination result. Therefore, it is possible to pass a specific section of
 20 the examination on one attempt, and fail it at a later date".

21 **C. NBME's refusal to use evidence-based scoring policy has prevented me**
 22 **from achieving a "passing" outcome on the exam. NBME's use of a**
 23 **product that shows reliability issues and is unable to "measure in a valid**
 24 **manner some competencies" have caused damages to my career and I am**
 25 **not allowed to be employed as a resident.**

26 **In other words, I have to pay way too high price for NBME's problem, and**
 27 **continue damaging my career.**
 28

SAC - Substantial performance

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1 "No one can take advantage of his own wrong." Civ. Code § 3517. In other words, "[h]e
2 who comes into equity [into court] must come with clean hands." See, *Wilson v. S.L.*
3 *Rey, Inc.* (1993) 17 Cal.App.4th 234, 244; *Kendall-Jackson Winery, Ltd. v. Superior*
4 *Court* (1999) 76 Cal.App.4th 970, 978 (emphasis added). The rationale of the doctrine
5 was explained in *Kendall-Jackson Winery, Ltd. v. Superior Court*, supra, at 978-79: "It
6 prevents "a wrongdoer from enjoying the fruits of his transgression . . ." (emphasis
7 added)." The party against whom the unclean hands doctrine is invoked must have
8 'directly infected' the actual cause of action before the court."

9 3.2. Despite my substantial performance, I did not get what I contracted for due to
10 NBME's intentional refusal to act accordingly to my "substantial performance" and the
11 circumstances. **NBME'S breach is important/material, since their refusal (to grant a**
12 **passing outcome on a substantial performance), when the purpose of the**
13 **contract has been fulfilled (plaintiff has demonstrated skills on each part) affects**
14 **the essence of the contract: demonstration of skills on each part of 2 CS –**
15 **passing outcome.**

16 The essence (purpose) of the contract can simply be described as having to two
17 elements contracted for by the two parties: demonstration of skills on each part
18 of 2 CS, and passing outcome. Here, the first one has been fulfilled by the
19 Plaintiff, Defendant refused to fulfill the second one.

20 NBME breached the contract since it did not grant the passing result for my
21 substantial performance, despite the fact that: NBME/ECFMG do not dispute my
22 clinical skills based on my (passing) exam scores; NBME /ECFMG do not claim
23 that I have not demonstrated these skills on the three "separate" parts of 2CS-
24 ecam. Despite this, NBME has not performed their part of the deal and granted an
25 "overall" passing outcome and showed a bad faith (violation of their duty to act
26 in a good faith and to refrain from harm). NBME has not been even able to explain
27 why I should take the exam again, except the "single administration" (which NBME
28 applies to people who will take the exam for a first time and have not previously passed

Injunctive relief requested

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(here it is a later breach, after Plaintiff's substantial performance and a large payments).

3.8. " 2[13] The circumstances of each case determine whether the injured party may treat a breach of contract as total. (Coughlin v. Blair , 41 Cal.2d 587 , cited American Type etc. Co. v. Packer, 130 Cal. 459, 463 [62 P. 744]; Clarke Contracting Co. v. City of New York, 229 N.Y. 413, 419-420 [128 N.E. 241]; Helgar Corp. v. Warner's Features, 222 N.Y. 449, 453-454 [119 N.E. 113]; Corbin on Contracts, § 946.)

V. RELIEF REQUESTED:

Based on the abovementioned statements, Plaintiff respectfully requests the Court to:

- 1) consider the evidence and the arguments provided by her as well (including the evidence-based articles),
- 2) consider her performance as a substantial performance, based on the fact that Plaintiff has passed each part of the 2 CS-exam, and her excuse for a non-full performance
- 3) grant a specific performance as an adequate remedy that willy compensate plaintiff, or as an alternative - monetary compensation,
- 4) If the Court favors Defendant (and the case is dismissed), Plaintiff respectfully request to be allowed to receive more information from NBME/ECFMG about what specifically she failed on each part: ICE (data gathering or data interpretation was failed?), CIS (whether she failed to fostering a relationship, failed to support emotions or what specifically), since the Plaintiff received two opposite results and it is unclear where the problem is and if there is a problem at all.

Injunctive relief requested

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1 If possible - by reviewing her work and evaluations/comments by the raters and
 2 the checklists with her evaluations, with names of the raters removed.
 3 5) If the Court favors the Defendant (and the case is dismissed), the Court to
 4 **consider that NBME already offered the Plaintiff to take exam for free the**
 5 **third time. And the Plaintiff to be allowed to take the exam for free (the third**
 6 **time), if she decides to retake exam. And, the Plaintiff to receives assurance**
 7 **and evidence** that the exam is reliable in terms of **test-retest reliability** and
 8 **inter-rater reliability**, as per "Current Concepts in Validity and Reliability for
 9 Psychometric Instruments: Theory and Application David A. Cook, MD, MHPE,
 10 Thomas J. Beckman, MD, FACP, Division of General Internal Medicine, Mayo
 11 Clinic College of Medicine, Rochester, Minn., **table 2**-criteria, published in The
 12 American Journal of Medicine (2006) 119, 166.e7-166.e16);
 13 6) If the Court favors the Defendant (and the case is dismissed) the Court to
 14 consider that NBME tries to invalidate Plaintiffs' previously achieved pass
 15 results/two attempts' results by not recognizing them, but at the same time
 16 NBME will use them or report them in a transcript. Plaintiff contends and
 17 requests these results be deleted (if invalidated and no recognized at all by
 18 NBME), or if NBME wants to use or send the information to her future employers,
 19 the results to be considered for an overall scoring decision on Plaintiff's
 20 performance.
 21 **I believe that my requirements are not unreasonable, considering**
 22 **the situation I am in, due to Defendants' misconduct and I respectfully**
 23 **request the evidence presented to be considered in support of the facts, which should**
 24 **lead to a fair and just decision on the case.**

Date: 09/07/2016

Respectfully submitted:

YDANA Kiprilov
 in Pro Per

ECFMG - Defendant (wrongfully removed)

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1 - "ECFMG partners with the National Board of Medical Examiners (NBME) in
2 **administering** the Step 2 Clinical Skills...Through this collaboration, ECFMG uses its
3 **experience in assessment** to ensure that...". (ecfm.org).

4 Thus, ECFMG claims that they are administrator (indeed, the test is administered at the
5 ECFMG-center in LA) and it likely that Court have been misled.

6 This Court previously ruled that [my] "*her causes of action, if any, must be directed*
7 *toward the creators or administrators of the test- that is to entities with authority to*
8 *create the test and issue scores. ECFMG has the authority to do neither.*"

9 ECFMG also claim that "End Step 2 CS" petition does not mention them. As pointed
10 out, the petition was created by American Med. Graduates (AMGs), and ECFMG is only
11 responsible for International Medical Graduates' assessment. In other words, a petition
12 created by IMGs will include ECFMG. I have pointed out and presented evidence that
13 before filing the lawsuit I did try to discuss the problem with NBME, and also requested
14 information about what constitutes a "pass" result on my exam reports in terms of
15 number of "Xs".

16 **10.NBME** in another lawsuit regarding Step 2 CS (Hartman v. NBME) used provisions
17 from EEOC and Title VII, to strengthen their arguments against the Plaintiff- medical
18 graduate even though the provisions were effective for "employer" only. In other words,
19 **in that case NBME took the role of an "employer" of an examinee (medical**
20 **graduate) to benefit from Title VII and EEOC provisions, but in this case - when I**
21 **used the provisions from the same law, NBME started whining that they are not**
22 **my "employer" and the provisions regarding discriminatory use of different cut**
23 **off levels on exams cannot be used. NBME again wants to have it both ways.**

24 I claimed that in the medical field, the employer has transferred the employment-
25 related testing to organizations like NBME. It was stated that the rule (regarding the use
26 of different cut of levels) was added in 1991, when this exam was not administered and
27 thus, the rule does not include organizations like NBME/ECFMG. The rule (42 U.S.C.
28 section 2000e-2 (l), however, includes entities that are not "employer" of the examinee.

CLINICAL SKILLS EVALUATION COLLABORATION

The Clinical Skills Evaluation Collaboration (CSEC) is a partnership of ECFMG and the National Board of Medical Examiners® (NBME®) formed to develop and administer clinical skills assessments of health care professionals. Because they evaluate critical skills not measured by multiple choice questions or computer-based testing, clinical skills assessments are essential to safe and effective patient care. CSEC strives to protect the public by ensuring that health care professionals meet standards of competence in communication and interpersonal skills, patient examination, spoken English proficiency, and clinical reasoning.

To learn more about CSEC, visit
www.csecassessments.org.

CSEC is an outstanding resource for members of the world's academic health professions community. CSEC provides full-service development of standardized patient (SP)-based clinical skills examinations that test all aspects of the clinical encounter. It also provides customized consultation and faculty development services to clients worldwide that have an interest in developing and administering their own clinical skills assessments. In 2015, CSEC provided four customized consultations and conducted six case-development workshops.

CSEC operates six U.S. test centers in Atlanta, Chicago, Houston, Los Angeles, and Philadelphia, where there are two centers. The CSEC centers comprise the largest network of dedicated clinical skills assessment centers in the United States, and one of the largest in the world. These specialized facilities are designed, built, and operated for the express purpose of administering SP-based exams. The CSEC centers are available for customized administration of clients' clinical skills examination programs.

Since 2004, CSEC has administered the Step 2 Clinical Skills (CS) component of the United States Medical Licensing Examination® (USMLE®). Each year, CSEC administers examinations to approximately 35,000 examinees. Exhibit 15 shows the number of Step 2 CS administrations by CSEC for the 10-year period 2006 to 2015.



CSEC by the Numbers

- Total test administrations, 2004–2015: more than 388,000
- Total SP Encounters, 2004–2015: approximately 4,700,000
- Highest number of test administrations in a calendar year: 36,030 (2015)
- Highest number of test administrations, U.S. and Canadian medical students/graduates, in a calendar year: 21,435 (2015)
- Highest number of test administrations, international medical students/graduates, in a calendar year: 17,513 (2008)

Source: ECFMG database. Data current as of March 11, 2016.

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CERTIFICATE OF SERVICE

When All Case Participants are Registered for the Appellate CM/ECF System

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on (date) .

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Signature (use "s/" format)

CERTIFICATE OF SERVICE

When Not All Case Participants are Registered for the Appellate CM/ECF System

I hereby certify that I ^{via mail} ~~electronically~~ filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on (date) .

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system. Appellee is a registered member.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within 3 calendar days to the following non-CM/ECF participants:

Appellee will be served via mail.

Signature (use "s/" format)

[Signature] Appellant in Pro se.